1444-677

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1429.

THE UNITED STATES, PLAINTIFF,

vs.

GEORGE R. EATON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 21, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1439.

THE UNITED STATES, PLAINTIFF,

vs.

GEORGE R. EATON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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14176

1 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-eight, before the honorable LeBaron B. Colt, circuit judge.

UNITED STATES
v.
GEORGE R. EATON. } No. 731, criminal docket.

This cause came on to be heard before the honorable LeBaron B. Colt, circuit judge, and the honorable Thomas L. Nelson, district judge, sitting; and thereupon the following certificate of division of opinion between the said judges was filed:

Certificate of division of opinion.—Filed Nov. 8, 1888.

The indictment in this cause is based upon the act of Congress of August 2, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." (24 Stat., 209.) The indictment was found at the May term of this court, A. D. 1888, and the defendant at the same term filed a demurrer thereto. This cause was thence continued to this present October term, 1888, when the same came on to be heard upon the defendant's demurrer. The indictment and demurrer are as follows:

Indictment.

UNITED STATES OF AMERICA.

Circuit court of the United States of America for the district of Massachusetts.

At a circuit court of the United States of America for the district of Massachusetts, begun and holden at Boston, within and for said district, on the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

2 The jurors for the United States of America within and for the district of Massachusetts, upon their oath, present,

That heretofore, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and eighty-six, and on divers days thereafter, up to and until the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, at Boston, in said district of Massachusetts, and in and within a certain establishment and place of business situated in said Boston, George R. Eaton was engaged in the business, avocation, and employment of a wholesale dealer in oleomargarine, and that the said Eaton, by reason of being so engaged in said business, avocation, and employment as aforesaid, was then and there subject and liable, and then and there became subject and liable to any and all

needful regulations made by the Commissioner of Internal Revenue of the said United States, with the approval of the Secretary of the Treasury of the said United States, for the carrying into effect an act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine, approved on the second day of August, in the year of our Lord one thousand eight hundred and eighty-six, which said act was duly passed by the Congress of the said United States, and that being then and there so subject and liable to said regulations, as aforesaid, which said regulations were then, to wit, on said first day of November and thereafter up to and until said twenty-eighth day of June, and there at said Boston, well known to him, the said Eaton, it became the duty of him, the said Eaton, then and there to keep a book showing the oleomargarine received by him, the said Eaton, and from whom the same was received, and also showing the oleomargarine disposed of by him, the said Eaton, and to whom the same was sold or delivered in accordance with the regulations made by the Commissioner of Internal Revenue of the said United States, and approved by the Secretary of the Treasury of the said United States, on the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six, and that the said Eaton did then, on said first day of November and thereafter, up to and until said twenty-eighth day of June, and there at said Boston, wilfully, knowingly, and unlawfully fail to keep such book showing the oleomargarine received by him, the said Eaton, and from whom the same was received, and also showing the oleomargarine disposed of by him, the said Eaton, and to whom the same was sold and delivered, as required by law, against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the first day of November, in the year of our Lord one thousand eight hundred and eighty-six, and on divers days thereafter, up to and until the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, at Boston, in said district of Massachusetts, and in and within a certain establishment and place of business situated in said Boston, George R. Eaton was engaged in the business, avocation, and employment of a wholesale dealer in oleomargarine, and that the
3 said Eaton, by reason of being so engaged in said business, avocation, and employment as aforesaid, was then and there subject and liable, and then and there became subject and liable, to any and all needful regulations made by the Commissionor of Internal Revenue of the said United States, with the approval of the Secretary of the Treasury of the said United States, for the carrying into effect an act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine, approved on the second day of August, in the year of our Lord one thousand eight hundred and eighty-six, which said act was duly passed by the Congress of the said United States, and that being then and there so subject and liable to said regulations as aforesaid, which said regulations were then, to wit, on said first day of November and thereafter, up to and until said twenty-eighth day of June, and there, at said Boston, well known to him, the said Eaton, it became the duty of him, the said Eaton, then and there to make a monthly return to the collector of internal revenue of the said United States for

the district, including said Boston, showing the oleomargarine received by him, the said Eaton, and from whom the said oleomargarine was received, and also showing the oleomargarine disposed of by him, the said Eaton, and to whom the same was sold or delivered, in accordance with the regulations made by the Commissioner of Internal Revenue of the said United States, and approved by the Secretary of the Treasury of the said United States on the twenty-fifth day of August, in the year of our Lord one thousand eight hundred and eighty-six; and that the said Eaton did then, on said first day of November and thereafter, up to and until said twenty-eighth day of June, and there, at said Boston, wilfully, knowingly, and unlawfully fail to make such monthly return to John E. Fitzgerald, then and there the collector of internal revenue of the said United States for the district, including said Boston, showing the oleomargarine received by him, the said Eaton, and from whom the same was received, and also showing the oleomargarine disposed of by him, the said Eaton, and to whom the same was sold and delivered, as required by law, against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided.

A true bill.

JOSEPH H. GOODALE,
Foreman of the Grand Jury.
BORDMAN HALL,
Ass't United States Attorney for the District of Massachusetts.

4 *Demurrer to indictment—filed Oct.* 10, 1888.

And the said George R. Eaton, in his own proper person, comes into court here, and, having heard the said indictment read, says that the said indictment and the matter therein alleged and set forth are not sufficient in law to compel him to answer thereto, and this the said defendant is ready to verify.

Wherefore he prays judgment, and that by the court here he may be dismissed and discharged of said indictment.

By his attorney.

P. A. COLLINS.

5 At the hearing in the circuit court upon the demurrer of the defendant, the following questions arose, upon which the judges by whom the court was held were divided in opinion, namely:

First. Whether a wholesale dealer in oleomargarine, who knowingly and wilfully fails and omits to keep a book showing the oleomargarine received by him and from whom the same was received, and also showing the oleomargarine disposed of by him and to whom the same was sold or delivered, as required by the regulations made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury August 25, 1886, is liable to the penalty imposed by section 18 of the act of Congress approved August 2, 1886, entitled "An act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." (24 Stat., 209.)

Second. Whether a wholesale dealer in oleomargarine, who knowingly and wilfully fails and omits to make monthly returns to the collector of

internal revenue, showing the oleomargarine received by him and from whom the same was received, and also showing the oleomargarine disposed of by him and to whom the same was sold or delivered, as required by the said regulations, is liable to the penalty mentioned in the first question.

Thereupon, at the request of the counsel for the United States, it is ordered that these questions be stated as aforesaid, and be certified, under the seal of this court, to the Supreme Court of the United States at its next session.

LEBARON B. COLT,
Circuit Judge.
THOS. L. NELSON,
District Judge.

A true record.
Attest:
JOHN G. STETSON, *Clerk.*

6 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Massachusetts district, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, certify that the foregoing is a true record of a certificate of division of opinion, filed November 8, 1888, in the cause pending in said circuit court, entitled No. 731, criminal docket, United States *v.* George R. Eaton, and ordered to be certified to the Supreme Court of the United States at its next session.

In testimony whereof I hereunto set my hand and the seal of said circuit court at Boston, in said district, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight, and of the independence of the United States, the one hundred and thirteenth.

[SEAL.] JOHN G. STETSON,
Clerk.

(Indorsement on cover:) No. 1439. The United States, plaintiff, vs. George R. Eaton. Filed November 21, 1888. Massachusetts C. C. U. S.

FILED.
APR 14 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, PLAINTIFF,
vs.
GEORGE R. EATON.
No. 291.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANTS, } No. 201.
v.
THOMAS R. EVANS.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, PLAINTIFF,
vs.
GEORGE R. EATON. } No. 291.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes up on a certificate of division in opinion from the circuit court of the United States for the district of Massachusetts.

The defendant, George R. Eaton, was indicted in May, 1888, in said circuit court under the act known as the oleomargarine law.

The indictment charges that from November 1, 1886, to June 28, 1887, the defendant was a wholesale dealer in

oleomargarine at Boston (Rec., p. 1); that as such dealer he was subject to the regulations made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury for carrying said act into effect; that under such regulations it became the duty of the defendant during the period specified to keep a book showing the oleomargarine received by him, from whom the same was received, and also showing the oleomargarine disposed of by him, and to whom the same was sold or delivered, in accordance with the regulations made by the Commissioner of Internal Revenue and approved by said Secretary, August 25, 1886, and that, during said period running from November 1, 1886, to June 28, 1887, the defendant did willfully, knowingly, and unlawfully fail to keep such book showing the oleomargarine received by him, and from whom the same was received, and also showing the oleomargarine disposed of by him, and to whom the same was sold and delivered, as required by law, against the peace, etc., and contrary to the form of the statute, etc. (p. 2).

Said indictment also charges that the defendant became liable under and by the aforesaid regulations, and it was his duty during the period specified to make a monthly return to the collector of internal revenue for the district, showing the oleomargarine received by him, the said Eaton, and from whom the same was received, and also showing the oleomargarine disposed of by him, and to whom the same was sold or delivered, in accordance with the regulations of August 25, 1886; and that the defendant did, during the period before specified, willfully, knowingly, and un-

lawfully fail to make such monthly return to the collector of internal revenue, showing the oleomargarine received by him, the defendant, and from whom the same was received, and also showing the oleomargarine disposed of by him, and to whom the same was sold and delivered, as required by law, against the peace, etc., and contrary to the form of the statute, etc. (pp. 3, 4).

The defendant demurred to the indictment, upon the ground that the matters therein alleged and set forth are not sufficient in law to compel him to answer thereto (p. 3).

The cause came on to be heard before Judges LeBaron B. Colt and Thomas L. Nelson, and the certificate of division filed November 8, 1888, shows that said judges holding said court were divided in opinion upon two questions; whereupon the same were duly certified to this court (pp. 3, 4).

The two questions are as follows:

> First. Whether a wholesale dealer in oleomargarine who knowingly and willfully fails and omits to keep a book showing the oleomargarine received by him and from whom the same was received, and also showing the oleomargarine disposed of by him and to whom the same was sold or delivered, as required by the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, August 25, 1886, is liable to the penalty imposed by section 18 of the act of Congress, approved August 2, 1886, entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine." (24 Stat., 209.)

Second. Whether a wholesale dealer in oleomargarine, who knowingly and willfully fails and omits to make monthly returns to the collector of internal revenue showing the oleomargarine received by him and from whom the same was received, and also showing the oleomargarine disposed of by him and to whom the same was sold or delivered, as required by the said regulations, is liable to the penalty mentioned in the first question.

STATUTES AND REGULATIONS.

The oleomargarine act, passed August 2, 1886 (24 Stat., 209), is entitled "An act defining butter; also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine."

The provision providing general penalties is found in the following section:

SEC. 18. That if any manufacturer of oleomargarine, any dealer therein, or any importer or exporter thereof, shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

The regulations referred to in the indictment are authorized by the twentieth section, which reads as follows:

> SEC. 20. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

THE REGULATION.

The regulation involved, which was made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, pursuant to said section 20, is as follows:

> Wholesale dealers in oleomargarine will keep a book (Form 61) and make a monthly return on Form 217, showing the oleomargarine received by them and from whom received; also, the oleomargarine disposed of by them and to whom sold or delivered.

It will be noticed that this regulation when separated into its two propositions furnishes the two grounds of the indictment set forth in the record, and, correspondingly, the two questions which are set forth in the certificate of division.

Form 61 provided for a record of all oleomargarine received by the wholesale dealer, showing the date of its receipt, from whom it was received, the amount, the manufacturer thereof, and also the date when the same was disposed of by the wholesale dealer, to whom it was sent, the name of manufacturer, and the amount. The serial numbers of the packages were to be stated in both cases.

Form 217 provided for a monthly return of the same statements and details by the wholesale dealer to the

Commissioner of Internal Revenue, and a recapitulation of its contents was to be verified by the oath of the dealer.

This rule is shown by the Department regulations to have been made August 25, 1886; it was terminated by the act of October 1, 1890 (26 Stat., 567, sec. 41, p. 621).

The oleomargarine act defines butter and defines oleomargarine, and places a special tax upon manufacturers and on sellers of the last-named commodity, and requires payment of a stamp duty on the same, and provides for publicity and for superversion of the manufacture, sale, and exportation thereof.

The regulation in question was duly formulated under said section 20 to provide certain necessary rules for a compliance with the intent of and for the carrying out of the purposes of the enactment.

The regulation is shown by Treasury Document of August 25, 1886 (series 7, No. 9, revised), to have been made by the Commissioner with the approval of the Secretary.

No contention appears to be made as to the needfulness of the rule, and as it was left to the Commissioner and Secretary to determine what was needful in the premises their decision was final.

The question involved is not of consequence in the future execution of the oleomargarine law, because section 41 of the tariff act of 1890 (26 Stat., 621) enacts that wholesale dealers in this article shall keep such books and render such returns as the Commissioner and Secretary may by regulation require, and that such books shall be subject to inspection.

THE QUESTION.

The sole question to be reviewed here, it is submitted, is whether Congress possessed power to authorize the officers named to establish the regulation requiring wholesale dealers in oleomargarine to keep a record of their dealings therein and to report the details of such dealings as required by the regulation quoted.

POINTS.

I.

THE REGULATION IS NEEDFUL AND IS WITHIN THE SCOPE AND PURPOSES OF THE ACT.

The act places the manufacture and sale of oleomargarine under the supervision of the internal-revenue officers of the Government and subjects the commodity and those who make or sell it to taxation.

It is in accord with preëxisting methods that regulations should be formulated and promulgated to aid in the enforcement of the law.

The paragraphs of the act directly applicable to wholesale dealers are as follows:

> SEC. 3. That special taxes are imposed as follows: * * * Wholesale dealers in oleomargarine shall pay four hundred and eighty dollars. Every person who sells or offers for sale oleomargarine in the original manufacturer's packages shall be deemed a wholesale dealer in oleomargarine.

By section 4 it is enacted that—

> Every person who carries on the business of a wholesale dealer in oleomargarine without having paid the special tax therefor, as required by law, shall, besides being liable to the payment of the tax, be fined not less than five hundred nor more than two thousand dollars.

And section 6 adds:

> And all sales made by manufacturers of oleomargarine, and wholesale dealers in oleomargarine, shall be in original stamped packages;

and declares the following penalty:

> Every person who knowingly sells or offers for sale, or delivers, or offers to deliver, any oleomargarine in any other form than in new wooden or paper packages as above described, or who packs in any package any oleomargarine in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years.

And section 10 adds the following:

> Every person who sells or offers for sale any imported oleomargarine, or oleomargarine purporting or claimed to have been imported, not put up in packages and stamped as provided by this act, shall be fined not less than five hundred dollars nor more than five thousand dollars and be imprisoned not less than six months nor more than two years.

Sections 11 and 12 are as follows:

> SEC. 11. That every person who knowingly purchases or receives for sale any oleomargarine which

has not been branded or stamped according to law shall be liable to a penalty of fifty dollars for each such offense.

SEC. 12. That every person who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax shall be liable for each offense to a penalty of one hundred dollars and to a forfeiture of all articles so purchased or received, or of the full value thereof.

Section 8 provides for the stamp tax of 2 cents per pound, and the method of its collection:

SEC. 8. That upon oleomargarine which shall be manufactured and sold, or removed for consumption or use, there shall be assessed and collected a tax of two cents per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

The analogies of the customs laws and of the laws relating to the collection of duties upon tobacco and spirits naturally suggested the regulation adopted under the oleomargarine law, and it seems plain that the proper and effective execution of this law would be scarcely possible without a regulation equivalent to the one now under examination.

II.

DECISIONS RELATING TO REGULATIONS.

As the word "regulation" has a technical meaning, an argument based upon definitions or upon general reasoning would be of little service.

Cases involving the exercise of executive power have, in several instances, come before the courts, and questions of the application and force of Departmental regulations have, from time to time, been passed upon by the judicial branch of the Government.

The scope and effect of regulations of the Departments have repeatedly come under consideration in the Court of Claims.

In *Harvey* v. *United States* (3 C. Cl., 39, 41), the court (Loring, J.) uses the following language:

> The act of Congress establishing this court gives it jurisdiction of claims arising under a regulation of an executive department, but that jurisdiction is to be exercised according to and subject to the laws of the United States, to which also all regulations of an executive department are subject, and if the order referred to was a regulation of an executive department, we know no reason and of no authority which could remove it, or any claims under it, from the operation of the statutes cited.
>
> But we think the order referred to is not a "regulation of an executive department." Those words describe rules and regulations relating to the subjects on which a department acts, and are made by its head under an act of Congress conferring that power, and thereby giving to such regulations the force of law; such as the rules and regulations of

> the Treasury Department for carrying into effect the revenue laws, for the warehouse system, for the prevention of smuggling, for commercial intercourse with the rebel States, etc. But the subject of the Mexican contributions was regulated by the statute of March 3, 1849 (9 Stat., p. 413), and is not left to the regulations of an executive department; and the order in question was merely a matter of the internal police of the Secretary's office in Washington, assigning to its clerks their duties.

In *Landram's Case* (16 C. Cls., 74, 84, 85) it is said (Davis, J.):

> Section 161 confers upon the heads of Departments the general power to make regulations for the government of the Departments not inconsistent with law. Section 251, which empowers the Secretary of the Treasury to issue regulations for the government of collectors, makes a distinction between "instructions" and "regulations." This distinction is inherent in the nature of the two things. An instruction is a direction to govern the conduct of the particular officer to whom it is addressed. A regulation affects a class or classes of officers. It was open to the Secretary of the Treasury to prescribe the allowances to collectors or the payment of distillery surveyors in the form of a regulation or in the form of an instruction. In the former case it would have brought them within the terms of section 1765; in the latter case they would have been outside of those terms.

In Savings Bank v. *United States* (*Id*., 335, 347, 349), the court (Richardson, J.) said:

> The Secretary of the Treasury, by virtue of the statute authorizing him to prescribe regulations,

made a rule providing that claims for refunds should be presented through the collectors of the respective districts on forms printed at the Department and furnished to the collectors.

* * * * *

The regulations and practice are matters of departmental business arrangements and convenience, and may well be left to the discretion of the commissioner and the direction of the head of the Department without detriment to the public service. They have been extensively promulgated and long followed. Taxpayers have become familiar with them and have been guided by them in seeking their remedy in case of erroneous payment of taxes.

The Secretary of the Treasury may abrogate them whenever he thinks the public interest demands it.

In *Maddox et al.* v. *United States* (20 C. Cls., 193), the head notes say

The War Department orders an extension of a military reservation. The "*improvements*" of squatters on the extension are appraised by a military board and the report is approved by the Secretary of War.

I. The Army Regulation, 1881 (Art. 139), which provides a method for compensating squatters on military reservations for "*valuable improvements*," having been recognized and in legal effect ratified by acts of Congress, must be deemed a lawful regulation of an executive department.

II. When Congress permit the orders of an executive department to be formulated as regulations and published and carried into effect, the legislative ratification must be implied.

In *Symonds' Case* (21 C. Cls., 148, 152), it is said that:

It may be assumed as a fundamental proposition that every regulation of an Executive Department of

> the Government must be in conformity to law when a law exists upon the subject of the regulation. The legislative will, as expressed in the statute made in pursuance to the constitutional power of Congress, is the supreme law of the land, binding alike on the officer and citizen.

In *Stotesbury* v. *United States* (23 C. Cls., 285) the effect of a regulation is discussed, and it is stated (292) that the "regulations prescribed by the Secretary of the Treasury were properly within the discretion reposed in him by the statute, and being authorized by law had the force of law."

The case in *Romero* v. *United States* (24 C. Cls., 331) related to a regulation made by the President, and the last two paragraphs of the syllabus read:

> V. The regulations for Indian affairs, 189,193, prescribed by the President under the Revised Statutes, section 465, can not be construed to lengthen a term of office limited by the Constitution and by the Revised Statutes (section 1769), nor to give the salary of the office to the incumbent holding over contrary to 1762, 1769.
>
> VI. The authority of the President to make executive regulations is subject to the implied condition that they be consistent with the statutes and in execution of and supplementary thereto.

The extent to which authority may be exercised by regulation is suggested in *Harrison* v. *United States* (26 C. Cls., 259). The case involves the power of the Public Printer to allow absences.

The court says (p. 270):

> The law imposes both the duty and the responsibility of granting or refusing leaves of absence ex-

> clusively upon the Public Printer. It is his duty to administer the statute according to its spirit and intent and with a proper regard to the just interests of both parties. He is authorized to administer it by "regulations," and may prescribe general rules which would practically exclude individual applications. He may make the leave of absence dependent upon good conduct, and in the exigency of pressing work, when other employés could not be procured, he would be justified in refusing it altogether. The employé has no legal right to a leave of absence until it be granted, and can no more dictate when he will take his vacation than a student in college or a boy in school. The Public Printer must determine the times and seasons and periods of absences as the needs or exigencies of his department may permit. But at this point his discretion stops and the supervision of the accounting officers begins.

The Supreme Court, also, has been called upon to consider and decide upon the force and application of executive regulations in several instances.

In *Kendall* v. *United States* (12 Pet., 524), the court declares fundamental principles in relation to executive and judicial powers, and says (p. 610) as follows:

> The executive power is vested in a President; and as far as his powers are derived from the Constitution he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power. But it by no means follows that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not and certainly can not be claimed by the President.
>
> There are certain political duties imposed upon many officers in the Executive Department the dis-

charge of which is under the direction of the President. But it would be an alarming doctrine that Congress can not impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case where the duty enjoined is of a mere ministerial character.

And in *United States* v. *Eliason* (16 Pet., 291) the general power of executive regulations and of their establishment is commented upon (p. 301) as follows:

> The power of the Executive to establish rules and regulations for the government of the army is undoubted. The very appeal made by the defendant to the fourteenth section of the sixty-seventh article of the Army Regulations is a recognition of this right. The power to establish implies, necessarily, the power to modify or repeal or to create anew.
>
> The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the Executive, and as such be binding upon all within the sphere of his legal and constitutional authority.
>
> Such regulations can not be questioned or defied because they may be thought unwise or mistaken. The right of so considering and treating the authority of the Executive, vested as it is with the command of the military and naval forces, could not be intrusted to officers of any grade inferior to the Commander-in-Chief; its consequences, if tolerated, would be a complete disorganization of both the Army and Navy. In the present instance, the order was adopted

> effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of "superior stock." This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes. The Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a Treasury regulation.

Symonds's case came to this court, *United States* v. *Symonds* (120 U. S., 46), and was affirmed.

In regard to regulations (p. 49) the court say:

> The authority of the Secretary to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. The contrary has never been held by this court. What we now say is entirely consistent with *Gratiot* v. *United States* (4 How., 80) and *Ex parte Reed* (100 U. S., 13), upon which the Government relies. Referring in the first case to certain Army regulations, and in the other to certain Navy regulations, which had been approved by Congress, the court ob-

served that they had the force of law. See also *Smith* v. *Whitney* (116 U. S., 181). In neither case, however, was it held that such regulations, when in conflict with the acts of Congress, could be upheld.

III.

THE THEORY OF THE PLAINTIFF.

The theory submitted on behalf of the plaintiff is—

(1) That the regulation made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury was a proper and a "needful" regulation under the oleomargarine law;

(2) That this regulation was an outgrowth of the statute and acquired and possessed the force of law;

(3) That the keeping of the records and the reporting of the details of the business, supervised under the law, became, as to the defendant, "things required by law in the carrying out or conducting of his business" (sec. 18);

(4) And that being authorized by Congress, and being formulated and promulgated pursuant to an enactment, and being subordinate to, and in furtherance of, the statute, and not in conflict with it, the regulation should, under the decisions, be sustained and the demurrer should be overruled.

Presenting the cases cited, counsel for the plaintiff begs to submit the questions certified by the judges of the court below to the determination of this court without other argument.

A. X. PARKER,
Assistant Attorney-General.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

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UNITED STATES *v.* GEORGE R. EATON.

DEFENDANT'S BRIEF: ON DEMURRER.

The indictment, in this case, is founded upon the Act of Aug. 2, 1886, entitled, "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation and exportation of oleomargarine."

The closest scrutiny of that Act fails to discover any provision under which this prosecution can be maintained.

Specific duties are described, specific offences are enumerated, and specific penalties are provided in the many sections of that Act; but nowhere in it do we find it required of a "wholesale dealer" to do the things that the Commissioner of Internal Revenue is supposed to have required the defendant to do, nowhere do we find the failure to do these things set down as a criminal offence, and nowhere do we find a penalty for not doing these things.

It must be, therefore, that by implication, the Government seeks to fasten a criminal offence upon the defendant.

It must be that under Section 20, "the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury," made some "needful regulations for the carrying into effect" of that Act, and that the defendant did not observe them. And if there is any penalty for the defendant's failure to observe them, it must be found in the omnibus

section 18, which prescribes a penalty of one thousa dollars fine.

The defendant respectfully submits the following propos tions: —

1. That the offences charged in the indictment, not bein offences at common law, must be found, if at all, recite clearly in the statute. This statute makes no mention of it and before its passage the defendant was perfectly free t deal as he pleased in oleomargarine.

2. If Congress had the right, upon pretence of raisin necessary revenue to pay the expenses of the government to pass this Act, it had no right to delegate to an executiv officer the power to make rules or regulations, the failure t comply with which would constitute a criminal offence. In other words, the legislative branch of the government cannot delegate its legislative functions to the executive.

3. The offence must be found, if at all, clearly set forth in the language of the statute itself. Section 20 is merely permissive. "The Commissioner of Internal Revenue *may* (or may not) make all needful regulations," etc. If he made such regulations they would not be "regulations prescribed by law," in the sense of the words used in *Aldridge* v. *Williams*, 3 *How.* 1–9. They could operate only upon the officers of the Internal Revenue system, not upon dealers in oleomargarine.

4. An executive officer cannot by his "regulations" alter or amend a Revenue law. All he can do is to *regulate the mode of proceeding* to carry into effect what Congress has enacted.

Morrill v. *Jones*, 106 *U. S.* 466.

5. He certainly cannot by his "regulations" from time to time create criminal offences.

6. But Section 18 prescribes no penalty for failure on the part of a wholesale dealer to obey such regulations as the

Commissioner may make. The penalty is imposed upon a dealer who shall "knowingly, wilfully omit, neglect or refuse to do, or cause to be done, any of the things required by *law*." Surely this language is plain enough. It cannot be tortured to embrace "regulations," by whomsoever made, and if it could do so, a penal offence could not thus be created.

7. Revenue laws must be strictly construed. Bishop Cr. Law I., Section 226 and notes, Sections 285, 283, 284.

8. The cases, *McCullough* v. *Maryland*, 4 *Wheaton*, 316.

U. S. v. *Eliason*, 16 *Peters*, 296,

Gratiot v. *the U. S.*, 4 *How.* 80,

Ex Parte Reed, 100 *U. S.* 13,

are not in point, and do not affect the case at bar, because they relate or refer to the undoubted power of the Government to regulate and control its civil and military establishments by making its servants subject to such regulations and control. These and similar decisions in no wise annul or infringe the ordinary rights of the free citizen.

U. S. v. *Barrows*, 1 *Abbott*, cc. 351, was a civil suit on a bond — a contract — and does not touch the point at issue here.

P. A. COLLINS,
Attorney for Defendant.

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